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UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON THE CONSTITUTION

—

LEGISLATIVE HEARING ON H.R. 4772, THE "PRIVATE PROPERTY RIGHTS IMPLEMENTATION ACT OF 2005."

JUNE 8, 2006

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TESTIMONY OF STEVEN J. EAGLE
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Mr. Chairman, Representative Nadler, and distinguished members of the Subcommittee:

My name is Steven J. Eagle. I am a professor of law at George Mason University, in Arlington, Virginia. I testify today in my individual capacity as a teacher of property, land use, and constitutional law. The principal focus of my scholarly research is the interface of private property rights and government regulatory powers. I am the author of a treatise on property rights, *Regulatory Takings* (3d ed., 2005), and write extensively on takings issues. I also lecture at programs for lawyers and judges, and serve as chair of the Land Use and Environment Group of the American Bar Association's Section of Real Property, Probate and Trust Law. I thank the Subcommittee for inviting me to appear today.

H.R. 4772 (the Act) Would Remove Unjustified Barriers to Federal Court Adjudication of Property Owners' Claims Brought Under the Constitution's Bill of Rights.

Mr. Chairman, I testify in support of H.R. 4772 because I believe that the "Private Property Rights Implementation Act of 2005," as its name implies, would clarify existing law and would resolve anomalies that often make it difficult or impossible for landowners to vindicate their constitutional rights in federal court.

These anomalies result largely from the expansion and interaction of judicial doctrines that initially were developed to provide sensible case management in federal courts. As such, these doctrines are prudential, not constitutional, in nature. It is therefore within the purview of the Congress to modify them in order to facilitate substantial justice for property owners.

The most pivotal of these doctrines is the two-prong "ripeness" requirement that is applicable only to regulatory takings cases and that was enunciated by the Supreme Court in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985). As I will elaborate, *Williamson County* requires that before a landowner may bring a regulatory takings claim in federal court, he or she must obtain a final decision as to what land uses government would permit ("final decision" prong) and must seek and be denied compensation ("state compensation" prong). Despite their apparently sensible requirements, both prongs have been interpreted is such extravagant fashion as to make federal judicial review of regulatory takings claims against localities almost impossible.

The Private Property Rights Implementation Act's Specific Goals.

The principal goals of the Act are:

- To ensure that property owners can obtain review by United States district courts of their regulatory takings claims that are brought against local government entities and are based solely on the Constitution and laws of the United States.

- To ensure that property owners can perfect their takings claims against both federal and state entities for review in federal court by following reasonable and well-defined steps.
- To ensure that the outcomes of lawsuits involving the regulatory taking of private property rights are not determined by arbitrary distinctions involving whether property rights are taken by the terms of local ordinances or indirectly by officials apply those ordinances; or whether the property rights exacted by government officials as a condition for approval of real estate development are classified as real property interests, personal property interests, or money.

In implementing these goals, the Act adheres to the admonishment by the Supreme Court in *Dolan v. City of Tigard*: "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances." 512 U.S. 374, 392 (1994).

Section 2 of the Act Would Ensure Property Owners Recourse to Federal Court When Their Takings Claims Are Based Solely On Federal Law and the United States Constitution.

Section 2 of the Act provides that U.S. district courts shall not refrain from deciding cases involving private property rights in land where the claims relate solely to federal law and where the no state court proceedings are pending relating to the same operative facts.

At first impression, it hardly would seem necessary that federal courts be charged with the responsibility of not abstaining or otherwise failing to exercise jurisdiction in cases involving the deprivation of rights where the plaintiffs do not invoke state law, but rely on federal law and the U.S. Constitution only. However, judicial interpretations of the "state compensation" prong of *Williamson County*, when combined with judicial interpretations of the full faith and credit statute, 28 U.S.C. § 1738, mean the state court review deemed necessary to "ripen" a takings claim for federal judicial review also precludes federal courts from reviewing the takings issues on which the claims are based.

"Ironically, an unripe suit is barred at the moment it comes into existence. Like a tomato that suffers vine rot, it goes from being green to mushy red overnight. It is never able to be eaten." Thomas E. Roberts, "Ripeness and Forum Selection in Fifth Amendment Takings Litigation," 11 *J. Land Use & Envtl. L.* 37, 72 (1995).

Last year, in *San Remo Hotel, L.P. v. City of San Francisco*, 545 U.S. 323, 125 S.Ct. 2491 (2005), the Supreme Court refused to read into the full faith and credit statute an exception that would avoid this perverse result. Section 2 of the Act provides the necessary corrective.

Background—The "State Compensation" Prong of *Williamson County*.

In *Williamson County*, the Supreme Court held that it could not determine whether the denial of a development permit constituted a taking. The respondent was deemed not to have obtained a "final decision" regarding permissible land uses. (This first prong of *Williamson County* is discussed later.) Furthermore, the second prong of the Court's two-part test was not satisfied because "respondent did not seek compensation through the procedures the State has provided for doing so." 473 U.S. at 194. For these two reasons, the Supreme Court ordered the claim to be dismissed as unripe. *Id*. at 185.

The following year, the Court noted, in *MacDonald, Sommer & Frates v. Yolo County*, that "a court cannot determine whether a municipality has failed to provide 'just compensation' until it knows what, if any, compensation the responsible administrative body intends to provide." 477 U.S. 340, 350 (1986).

Taken at face value, the latter statement suggests that the second prong of *Williamson County* simply requires that an owner asserting that a government action constitutes a taking must make a formal demand upon the responsible agency for compensation and that the demand must be rejected before the owner has a constitutional takings claim. However, *Williamson County* requires that the landowner follow state procedures to obtain compensation, and every state provides recourse to the full panoply of judicial review—up through the State's highest court.

The conceptual basis for the "state compensation" prong of *Williamson County* was articulated as follows: "The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Id*. "[B]ecause the Fifth Amendment proscribes takings *without just compensation*, no constitutional violation occurs until just compensation has been denied." *Id*. at 195, n.13 (emphasis in original).

The Court also drew an analogy to suits brought against the United States. It stated that "we have held that taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act, 28 U.S.C. § 1491. Similarly, if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Williamson County*, 473 U.S. at 195 (citation omitted).

Yet neither of these bases for requiring landowners to run the gauntlet of state litigation in order to ripen a federal claim is sound.

It is true that the federal government and the States and their subdivisions may take private property for public use, subject to the condition that they pay just compensation. But there is nothing unique in this arrangement. The U.S. Constitution similarly conditions many other governmental powers. The Supreme Court holds that government may deprive individuals of the right to free speech, conditioned on an adequate showing of fighting words, slander, refusal to follow reasonable time, place, and manner restrictions, etc. Likewise, the Fourth Amendment permits government to search and seize the persons,

papers, and effects of individuals, but that, too, is conditioned on reasonableness and, under some circumstances, the issuance of a search warrant. As a leading scholar and litigator in the field of eminent domain, Professor Gideon Kanner, has written:

> [T]here is nothing in the Constitution that forbids the government from depriving its citizens of life, liberty, or property either. The Constitution only requires that such deprivations not occur without due process of law, just as takings may not occur without just compensation.
>
> Thus, if we were to take the *Williamson County* reasoning as reflecting reasoned constitutional doctrine, we would have to conclude that plaintiffs claiming any deprivation of constitutionally protected rights without due process of law—the life's blood of 42 U.S.C. § 1983 litigation—should not be able to sue in federal courts either, without a preliminary detour through the state courts.

Gideon Kanner, "Hunting the Snark, Not the Quark: Has the U.S. Supreme Court Been Competent in Its Effort to Formulate Coherent Regulatory Takings Law?", 30 *Urb. Law.* 307, 328 (1998).

It is no more logical to force a landowner who has been subjected to a taking to litigate the issue of just compensation in state court than it is to force someone denied a parade permit to litigate in state court the issue of whether the time, place, and manner restrictions cited as justifications were reasonable.

Adding to these anomalies, the Supreme Court held, in *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997), that a municipal defendant may remove a regulatory takings case to federal court without regard to *Williamson County* ripeness requirements. Relying on this, the plaintiff in *Kottschade v. City of Rochester*, 319 F.3d 1038 (8th Cir. 2003)., argued that the landowner should be able to remove to federal court as well.

The plaintiff argued, citing 28 U.S.C. § 1441(a), that only state-court actions that originally could have been filed in federal court may be removed to federal court by the defendant." Therefore, if the defendant could remove the regulatory takings case to federal court without the establishment of ripeness, the plaintiff should be able to file the case without establishing ripeness. The Eighth Circuit rejected the argument, suggesting that, while *Williamson County* has been substantially eroded, any determination that it had been overruled in *City of Chicago* should be left to the Supreme Court:

> [A]s the District Court noted, *City of Chicago*'s holding addresses only the question of federal-question jurisdiction over a ripe takings claim. It does not explicitly answer the question of what is necessary to render a takings claim ripe. The Supreme Court has not explicitly overruled or modified the ripeness requirements laid out in *Williamson* in the context of takings cases. The requirement that all state remedies be exhausted, and the barri-

> ers to federal jurisdiction presented by res judicata and collateral estoppel that may follow from this requirement, may be anomalous. Nonetheless *Williamson* controls the instant case. . . . Whether something similar should occur here is for the Supreme Court to say, not us.

319 F.3d at 1040-41. The Supreme Court declined the invitation. 540 U.S. 825 (2003).

Also, the Supreme Court's analogy to the review of claims against the United States under the Tucker Act is misleading in two respects. First, prior to 1855 private claims were barred by sovereign immunity, with the only recourse being private bills introduced in Congress. The Court of Claims, established in that year, originally had the authority only to recommend the disposition of claims to Congress. Only in 1863 was the court given the power to adjudicate claims. The Tucker Act of 1887 reenacted and revised the existing statutes and gave the court the authority to hear claims against the United States based on the Constitution. See Richard H. Seamon, "Separation of Powers and the Separate Treatment of Contract Claims Against the Federal Government for Specific Performance, 43 *Vill. L. Rev.* 155, 175-77 (1998). To this day Congress may refer bills to the court, most recently styled the U.S. Court of Federal Claims, for its recommendations. See 28 U.S.C. § 1492. Thus, the functions of the tribunal have changed over time and it has not functioned exclusively in an independent judicial capacity.

More important, the Court of Federal Claims is an instrumentality of the United States, and, with respect to federal takings, functionally serves as the designee that decides, on behalf of the government actor, whether the actor's conduct should result in the payment of just compensation or not. The local government equivalent would be an office in the city law department or a city court given the power to make or deny awards. In the case of an alleged municipal taking, the State is a third party. While they adjudicate takings cases, state courts do so on behalf of the State and not as agents of the locality.

The Supreme Court has held, in *Monell v. Department of Social Services of New York*, 436 U.S. 658 (1978), that local government entities are amenable to suit under the Civil Rights Act, 42 U.S.C. § 1983. This statute imposes liability on those who deprive individuals of "rights, privileges, or immunities secured by the Constitution and laws."

Background—The Full Faith and Credit Statute and *San Remo Hotel*.

Since the U.S. Constitution is the supreme law of the land, state courts must apply it and litigants suing in state court are presumed to submit for adjudication their federal constitutional claims as well as their state claims. However, in *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964), the Supreme Court held that plaintiffs could submit their state claims to state court and explicitly reserve their federal claims for subsequent proceedings in federal court.

If an issue is decided by a state court, the losing party generally is precluded from relitigating that issue in federal court. The federal full faith and credit statute, 28 U.S.C.

§ 1738, provides that judicial proceedings in one State "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . ."

In *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 125 S.Ct. 2491 (2005), an affordable housing ordinance prohibited the petitioners from converting their 62-unit hotel in the Fisherman's Wharf neighborhood from residential to tourist use, unless they provided replacement residential units or paid a $567,000 "in lieu" fee. The petitioners litigated their takings claims based on California law in the California courts, and asserted that they would reserve their federal takings claims for adjudication in federal court, if necessary. The California Supreme Court found against the landowners, but noted that they had reserved their federal causes of action.

In the federal litigation, however, the U.S. Court of Appeals for the Ninth Circuit subsequently held that issue preclusion applied. *San Remo*, 364 F.3d 1088 (9th Cir. 2004). Claim preclusion did not apply, with the result that the plaintiffs had a right to go to federal court, but could assert no issues of substance when they got there.

On the other hand, the U.S. Court of Appeals for the Second Circuit reached a very different conclusion in *Santini v. Connecticut Hazardous Waste Management Service*, 342 F.3d 118 (2nd Cir. 2003). It declared:

> It would be both ironic and unfair if the very procedure that the Supreme Court required Santini to follow before bringing a Fifth Amendment takings claim—a state-court inverse condemnation action—also precluded Santini from ever bringing a Fifth Amendment takings claim. We do not believe that the Supreme Court intended in *Williamson County* to deprive all property owners in states whose takings jurisprudence generally follows federal law (*i.e.,* those to whom collateral estoppel would apply) of the opportunity to bring Fifth Amendment takings claims in federal court.

342 F.3d at 130. The Supreme Court granted certiorari in *San Remo* to resolve the conflict between the two cases.

The U.S. Supreme Court found that the state supreme court in *San Remo* did not confine its analysis to California jurisprudence, but considered federal takings jurisprudence as well.

Justice Stevens stated the question before the Court as "whether we should create an exception to the full faith and credit statute, and the ancient rule on which it is based, in order to provide a federal forum for litigants who seek to advance federal takings claims that are not ripe until the entry of a final state judgment denying just compensation." 125 S.Ct. at 2501.

Furthermore, Stevens reasoned that *England*, the case supporting the right of litigants to reserve their federal claims while litigating others in state court, applies only when the

antecedent state issue "was *distinct* from the reserved federal issue." *Id*. at 2502 (emphasis in original). He concluded:

> Although petitioners were certainly entitled to reserve some of their federal claims . . . *England* does not support their erroneous expectation that their reservation would fully negate the preclusive effect of the state-court judgment with respect to any and all federal issues that might arise in the future federal litigation. Federal courts, moreover, are not free to disregard 28 U.S.C. § 1738 [the full faith and credit statute] simply to guarantee that all takings plaintiffs can have their day in federal court.

Id. at 2501-02.

Background—The Use of Abstention Doctrines to Avoid Federal Adjudication of Fifth Amendment Rights.

As a matter of judicial policy, the federal courts have developed a number of doctrines under which they would abstain from ruling on disputes otherwise properly before them.

Under "*Pullman* abstention," federal courts would avoid premature rulings on unsettled questions of state law, and instead retain jurisdiction while those issues are decided by state courts. *Railroad Commission v. Pullman*, 312 U.S. 496 (1941). Given the wide range of fact patterns and very broad discretion typically accorded local land use regulators, it has proved easy for a federal court to abstain on ruling on landowners' Fifth Amendment takings claims on the grounds that the treatment of those claims in state court would be uncertain. See *Pearl Investment Co. v. City and County of San Francisco*, 774 F.2d 1460 (9th Cir. 1985).

Under "*Burford* abstention," federal courts should avoid construing "complex" state regulatory programs. *Burford v. Sun Oil Co*., 319 U.S. 315 (1943). For instance, where a State had established an "elaborate review system for dealing with the geological complexities" of oil and gas fields, federal court interpretations might "have had an impermissibly disruptive effect on state policy for the management of those fields." *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 815 (1976). In some cases, however, courts have seized upon *Burford* abstention to avoid ruling on routine matters of subdivision controls. See *Pomponio v. Fauquier County Board of Supervisors*, 21 F.3d 1319 (4th Cir. 1994).

Under "*Younger* abstention," federal courts should not become involved when a dispute is the subject of pending state litigation. *Younger v. Harris*, 401 U.S. 37, 54 (1971). In *Aaron v. Target Corp.*, 269 F. Supp. 2d 1162 (E.D. Mo. 2003), the U.S. district court found "one of the rare cases in which possible 'bad faith, harassment, or some extraordinary circumstance' makes abstention inappropriate.'" *Id*. at 1172. The U.S. Court of Appeals for the Eighth Circuit reversed, holding that the trial court should have exercised *Younger* abstention, despite the fact that condemnation proceedings were not commenced

in state court until almost two weeks after federal injunctive relief was sought. 357 F.3d 768 (8th Cir. 2004).

Act Section 2 Implements Protection for Fifth Amendment Property Rights in the Situations Described Above.

Section 2 of the Private Property Rights Implementation Act would protect private property rights in the situations I have just described.

The proposed addition by Section 2 of a Subsection (d) to 28 U.S.C. § 1343 would require the U.S. district courts to exercise jurisdiction over landowners' claims that they have been deprived of their property rights, without the need to pursue state judicial remedies. This would abrogate the prudential second prong of *Williamson County*.

In an opinion concurring in the judgment in *San Remo* in which Justices O'Connor, Kennedy, and Thomas joined, Chief Justice Rehnquist agreed that the present full faith and credit statute requires the preclusion of issues in federal court that had been decided in the process of "ripening" the case in state court. He went on to declare:

> It is not clear to me that *Williamson County* was correct in demanding that, once a government entity has reached a final decision with respect to a claimant's property, the claimant must seek compensation in state court before bringing a federal takings claim in federal court. The Court in *Williamson County* purported to interpret the Fifth Amendment in divining this state-litigation requirement. . . . More recently, we have referred to it as merely a prudential requirement. *Suitum v. Tahoe Regional Planning Agency,* 520 U.S. 725, 733-734 (1997). It is not obvious that either constitutional or prudential principles require claimants to utilize all state compensation procedures before they can bring a federal takings claim. Cf. *Patsy v. Board of Regents of Fla.,* 457 U.S. 496, 516 (1982) (holding that plaintiffs suing under § 1983 are not required to have exhausted state administrative remedies.

125 S.Ct. at 2508 (Rehnquist, C.J., concurring in judgment).

In practice, the state litigation requirement has proved extremely onerous, and only plaintiffs who have been prepared to devote a decade of time and hundreds of thousands of dollars in attorney fees and other expenses could expect to obtain a chance to litigate in federal court. *See generally*, John J. Delaney & Duane J. Desiderio, "Who Will Clean Up the 'Ripeness Mess'? A Call for Reform so Takings Plaintiffs Can Enter the Federal Courthouse," 31 *Urb. Law*. 195 (1999).

The answer to what sometimes is termed the "two bites at the apple" problem is clear—the plaintiff should have one bite, but the right to decide whether it is taken in state or federal court. The Act would accomplish this by permitting the landowner to sue for the relief provided under Section 1983 without having to go to state court first.

Likewise, Section 2 of the Act would limit overly-broad abstention in property rights cases by federal district courts. In adding Subsection (c) to 28 U.S.C. § 1343, it mandates that district courts "shall" exercise jurisdiction when there is no invocation of state law and no parallel proceeding actually pending in State court. In adding Subsection (e), it would impose strict limitations on the certification of unsettled questions of state law to the highest appellate court of the State in question.

Section 2 of the Act Would Reduce Undue Burdens on Property Owners Resulting from Uncertainty About the Definitiveness of Refusals to Rule Affirmatively on Development Applications.

In *Williamson County*, the plaintiff filed suit in federal court immediately after the planning commission denied its application for permission to expand a subdivision. The plaintiff did not pursue alternative forms of relief, such requesting a variance, appealing to the County Council, requesting that the county's general plan be amended, or suing in inverse condemnation in state court. 473 U.S. at 196-97. The Supreme Court ruled that it could not determine whether there had been a taking, because there had been no "final decision" by the planning commission. Under the "final decision" prong of *Williamson County*, an as-applied takings claim "is not ripe until the government entity charged with implementing the regulation has reached a final decision regarding the application of the regulations to *the property* at issue." *Id*. at 186 (emphasis added).

Permit delays are very expensive for developers, since mortgage interest, taxes, and many other expenses continue unabated. On the other hand, government planners remain steadily employed. Without a "final decision," landowners have no recourse to federal court under *Williamson County*. For these reasons, delay increases the chances that the landowner will surrender many development rights or agree to large exactions in order to gain some sort of development approval. For this reason, localities faced with development applications have every incentive to say "try again" instead of "no." In some cases, developers comply with government requests that they rework a given application time after time, only to have new demands imposed after previous demands are satisfied. See *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999).

A second reason why the "final decision" prong has proved unsatisfactory is that, under general principals of American land use law, regulators are not obligated to issue determinations of permissible uses. Rather, they do, or do not, issue development permits based on the specifics contained in landowners' development applications. In addition, the discipline of land use planning does not lend itself to such determinations, since land use proposals incorporate hundreds of variables with respect to the potential uses of a parcel, the size, shape, and density of structures, landscaping, traffic flow, and other aspects of modern development. Thus, planners simply cannot determine, on a single scale, "how much" development is permissible. "The planner's job is to draw an abstract plan and then determine whether a specific proposal meets all the requirements." Michael M. Berger, "The 'Ripeness' Mess in the Federal Courts, C872 *ALI-ABA* 41 (1993).

For all of these reasons, the apparently simple "final decision" prong of *Williamson County* has embroiled landowners in litigation over the nuances of the plethora of "sub-prongs" that have embellished the basic requirement. See, e.g., *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 353 n.9 (1986) (holding submitted plan must not be "exceedingly grandiose"); *Gil v. Inland Wetlands and Watercourses Agency*, 593 A.2d 1368, 1374-75 (Conn. 1991) (holding multiple applications expected and four insufficient here); *Eide v. Sarasota County*, 908 F.2d 716 (11th Cir. 1990) (holding number dependent upon nature of project and challenge); *Landmark Land Co. v. Buchanan*, 874 F.2d 717 (10th Cir. 1989) (requiring one application plus some effort to pursue compromise with city).

Section 2 of the Act would assist by defining a "final decision" as involving one meaningful application, together with one request for a waiver and one administrative appeal, if these are available and the request would not be futile.

Sections 3 and 4 of the Act Would Impose Similar "Final Decision" Rules Respecting Federal Actions.

Section 3 of the Act would amend the "Little Tucker Act," 28 U.S.C. § 1364, which gives district courts concurrent jurisdiction with the U.S. Court of Federal Claims for civil actions against the United States, not exceeding $10,000 in amount. The amendment would add a new Subsection (h), defining "final decision" in the same manner as Section 2.

Likewise, Section 4 would amend the Tucker Act, 28 U.S.C. § 1491(a), by adding a new Paragraph (3), defining "final decision" in the same manner.

Section 5 of the Act Clarifies the Intent of Congress that Extraneous Interpretations Unduly Burdening Private Property Rights be Discarded.

Section 5 of the Private Property Rights Implementation Act of 2005 clarifies that it is the intent of Congress that, insofar as they are not mandated by the Constitution, a number of arbitrary or extraneous interpretations of takings law that derogate from private property rights not be imposed.

Exactions of Property for Development Approval Must be Based on "Rough Proportionality" and an "Individualized Determination" of Need.

Under the doctrine of "unconstitutional conditions," government may not condition receipt of a benefit, or upon grant or deny any individual a privilege, subject to conditions that improperly "coerce," "pressure," or "induce" the waiver of that individual's constitutional rights. "[T]his Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the bene-

fit for any number of reasons, there are some reasons upon which the government may not rely." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

Just as the Court held that a college teacher did not have to choose between renewal of his contract or freedom of speech in *Perry*, it held in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), that the requirement that a landowner dedicate property in exchange for a building permit would constitute an unconstitutional condition where there was no "essential nexus" between "the condition substituted for the prohibition [and] the end advanced as the justification for the prohibition. . . . In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.'" *Id*. at 837 (citation omitted).

While in *Nollan* there was no nexus between the Commission's power to ensure the view of the ocean from the public highway and its insistence that the landowner surrender an easement along the beach behind his house, the situation was different in *Dolan v. City of Tigard*, 512 U.S. 374 (1994). The Dolans applied for permission to expand their plumbing supply store and to pave the adjoining parking lot. These changes would have some connection with the City's traffic congestion and storm water problems. The issue, then, was the extent of the nexus required in order to justify the City's demands that easements be granted along a creek behind the store for flood control and in front of the store for a bicycle path.

The Supreme Court held that there must be "rough proportionality" between the required dedications and the impacts of the proposed development, and that this proportionality be calculated not by using citywide ratios, but rather through an "individualized determination." *Id*. at 391.

The Act Would Apply "Rough Proportionality" and "Individualized Determination" to Legislative as Well as Administrative Decisions.

Dolan noted that the Court had granted local land use regulations considerable latitude in the past, but that those regulations "involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel." 512 U.S. at 385. However, the Court has never explicated the distinction between "legislative" and "adjudicative" determinations. Some states have taken the position that all zoning ordinances, whether they are comprehensive or relate only to one parcel, should be treated as "legislative." See, e.g., *Arnel Development Co. v. City of Costa Mesa*, 620 P.2d 565 (Cal. 1980). Others have deemed small-scale rezoning essentially an administrative, or quasi-judicial function. See, e.g., *Board of County Commissioners of Brevard County v. Snyder*, 627 So. 2d 469 (Fla. 1993).

The problem is encapsulated in *Parking Association of Georgia, Inc. v. City of Atlanta*, 515 U.S. 1116 (1995). There, the City passed an ordinance, intended to beautify the

downtown area for upcoming Olympic games, by requiring downtown parking lot owners to devote considerable space and expense to landscaping. The Court denied certiorari, over the strong dissent of Justices Thomas and O'Connor:

> It is hardly surprising that some courts have applied *Dolan*'s rough proportionality test even when considering a legislative enactment. It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking. A city council can take property just as well as a planning commission can. Moreover, the general applicability of the ordinance should not be relevant in a takings analysis. If Atlanta had seized several hundred homes in order to build a freeway, there would be no doubt that Atlanta had taken property. The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference.

Id. at 1117-18 (Thomas, J., dissenting from denial of cert.).

Section 5 of the Act would clarify the intent of Congress by amending the Civil Rights Act, 42 U.S.C. § 1983, to state that takings liability would apply to an unconstitutional condition or exaction, "whether legislative or adjudicatory in nature."

Section 5 of the Act also would clarify the intent of Congress by amending the Civil Rights Act, 42 U.S.C. § 1983, to state that takings liability for exactions would apply to the requirement of payment of a monetary fee, in addition to the requirement of a dedication of real property.

In *Ehrlich v. City of Culver City*, 911 P.2d 429 (Cal. 1996), a case remanded by the U.S. Supreme Court in light of *Dolan*, the Supreme Court of California held that a monetary exaction "in lieu" of the provision of art in private buildings had to meet the same standards of "rough proportionality" and an "individualized determination" as would a dedication of real property. On the other hand, the New York Court of Appeals has held that "rough proportionality" is not applicable to perpetual, but non-possessory, conservation easements. *Smith v. Town of Mendon*, 822 N.E.2d 1214 (N.Y. 2004). The U.S. Supreme Court has suggested, but not definitively ruled, that *Nollan* and *Dolan* are limited to exactions of real property. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 703 (1999); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 546-47 (2005).

Clarification that Every Subdivided Lot is a Separate Parcel for Takings Purposes.

Section 5 of the Act would clarify the intent of Congress by amending the Civil Rights Act, 42 U.S.C. § 1983, to state that whether the restrictions placed upon a platted and approved building lot in a subdivision are so severe as to constitute a regulatory taking shall be determined with respect to that lot.

This might appear self-evident, but it is very easy for property owners to become ensnared in the "parcel as a whole" doctrine enunciated in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). There, the Court wrote that "'[t]aking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather . . . on . . . the nature and extent of the interference with rights in the parcel as a whole . . . ." *Id*. at 130-31.

While "parcel as a whole" might be sensible in theory, in practice it has proved an exceedingly difficult concept to adjudicate fairly. Contiguous lands slowly might be acquired over time, and parts of a large tract might have been sold off long before the contemplated use or regulatory imposition at issue. Also, a myriad of problems exist involving the coordination of non-contiguous parcels, and regarding parcels belonging to entities the beneficial ownership of which is overlapping but not co-extensive. A given case might involve a mixture of several of these types of issues. For these reasons, there has been considerable litigation involving what sometimes is referred to as the "relevant parcel" problem. See, e.g., *Seiber v. United States*, 364 F.3d 1356 (Fed. Cir. 2004). For analysis, see Dwight H. Merriam, "Rules for the Relevant Parcel," 25 *U. Haw. L. Rev*. 353 (2003).

Section 5 does not relate to parts of larger tracts that are self-selected by landowners. Rather, it clarifies that "relevant parcel" complexities, expense, and delay should not frustrate the efforts of property owners to obtain constitutional protection for their interests in subdivision lots that are taxed, or otherwise treated and recognized as independent units of property by government itself.

Clarification that a Deprivation of Due Process of Law Means Arbitrary or Capricious Conduct or an Abuse of Discretion.

The Civil Rights Act, 42 U.S.C. § 1983, provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."

The Supreme Court has held that the Due Process Clause of the Fourteenth Amendment may impose liability for undue interference with the use of land not merely because it deprives the land of all value, but also because the regulation itself is arbitrary, capricious, or unreasonable. *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976). "The guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the objective sought to be obtained." *PruneYard Shopping*

Center v. Robins, 447 U.S. 74, 84-85 (1980). For a good explication of the various meanings of substantive due process, see *Pearson v. City of Grand Blanc*, 961 F.2d 1211 (6th Cir. 1992).

Last year, in *Lingle v. Chevron U.S.A. Inc*., 544 U.S. 528 (2005), the Supreme Court made clear that landowners may challenge government deprivations of property rights under the Due Process Clause, independent of any rights they might have under the Takings Clause. *Id*. at 543. *Lingle* thus corrects the impression of some lower federal courts that they had to apply all of the panoply of regulatory takings doctrine, including *Williamson County* ripeness, to due process claims involving real property. An example is *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996), where the Ninth Circuit drew an analogy to the Supreme Court's holding in a criminal case, *Graham v. Connor*, 490 U.S. 386 (1989), that the validity of a search and seizure should be determined with reference to the Fourth Amendment rather than to generalized principles of due process.

In the same manner as the Ninth Circuit in *Armendariz* gravitated towards a criminal case to define the procedural standards for judging landowners' due process claims, several Circuit Courts of Appeals have utilized a Supreme Court opinion involving a high-speed police chase to articulate the standard for what constitutes a deprivation of due process. In *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), the Court considered whether the high-speed chase manifested indifference the human life. It declared that the "Due Process Clause is violated by executive action only when it 'can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense.'" *Id.* at 847 (citation omitted). *Lewis* noted that the Court had articulated the "shocks the conscience" test in *Rochin v. California*, 342 U.S. 165 (1952) where the forced pumping of a suspect's stomach violated the "decencies of civilized conduct." 523 U.S. at 846.

The "shocks the conscience" test has been applied regarding landowners' claims of property deprivation in cases such as *Lindquist v. Buckingham Township*, 68 Fed. Appx. 288, 2003 WL 21356409 (3d Cir. May 26, 2003) (not published in F.3d), and *Creative Environments, Inc. v. Estabrook*, 680 F.2d 882, 883 (1st Cir. 1982). Similarly, the District of Columbia Circuit recently adopted an "egregious government misconduct" requirement. *George Washington University v. District of Columbia*, 318 F.3d 203, 209 (D.C. Cir. 2003).

Whatever the merits of a "shocks the conscience" test under the exigencies of police work, where fleeing suspects or dissipating evidence requires instant decisions, deprivations of landowners' property does not result from the reflexive conduct of police officers under great stress. Rather, such deprivations result from the methodical actions of government officials who have every opportunity to consult their superiors, experts, and legal counsel before acting.

Section 5 of the Act would clarify the intent of Congress by amending the Civil Rights Act, 42 U.S.C. § 1983, to state that the standard for review of a alleged deprivation of substantive due process is whether the government conduct "is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

I believe, Mr. Chairman, that the changes embodied in the Private Property rights Implementation Act of 2005 are welcome and important. They would assist substantially in protecting private property rights in the United States without unduly restricting the exercise of their proper police power functions by the federal government, the States, or local governments.